Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D2-43-4591-87
VC GEORGE J
29 JUNE 1989

Bankruptcy — Receiving and adjudicating orders made — Application by undischarged bankrupt for review — Whether sanction of Official Assignee necessary — Bankruptcy notice founded on default judgment — Application for order to set aside judgment dismissed — Illegality of transaction alleged — Whether consideration for transactions was bad — Bankruptcy Act 1967, ss 38, 92 & 105

Contract — Consideration — Illegality — Whether contract void — Contracts Act 1950, s 24

In this case, an undischarged bankrupt applied to the court for an order rescinding and annulling respectively the receiving and adjudicating orders made in the proceedings. The act of bankruptcy relied upon by the petitioning creditor was the non-compliance with a bankruptcy notice founded on a judgment in default against the bankrupt. The bankrupt's application for an order to set aside the judgment had been dismissed following which the bankruptcy proceedings were commenced. Following the making of the receiving and adjudicating orders, the bankrupt applied for leave to appeal out of time against the order dismissing his application for the setting aside of the default judgment. That application too was dismissed. The bankrupt then applied to the court for the order for rescission and annulment, invoking ss 92(1), 105(1) and 105(5) of the Bankruptcy Act 1967 and the inherent jurisdiction of the court. The bankrupt sought review of the orders made on the ground that the judgment on which the act of bankruptcy was founded was a judgment which had no valid or legal consideration and that in any event it was for an amount significantly in excess of what the plaintiff was entitled to sign judgment for and as such, particularly as it was a default judgment, was irregular and bad. It was contended for the bankrupt that the consideration for the judgment was invalid as the lease and the assignment thereof, the subject matter of the action in which the judgment was obtained, were at all material times illegal and null and void ab initio as each of them was made in contravention of s 3(1) of the Radioactive Substances Act 1968. The transactions concerned an X-ray machine and the parties concerned did not hold a licence under the Act to sell or dispose or purchase X-ray apparatus. A preliminary issue which arose was as to whether the sanction of the Official Assignee under s 38(1)(a) of the Bankruptcy Act 1967 was necessary for the application.

Held, allowing the application:

(1) An undischarged bankrupt may make an application as in the instant case without the sanction of the Official Assignee as s 38(1)(a) of the Bankruptcy Act 1967 had no application to an application under s 92(1) or s 105(1) of the same Act.

(2) While a bankrupt cannot bring an action to set aside a judgment even if it was obtained fraudulently because the cause of action is vested in his trustee, the bankruptcy court is entitled to enquire into the validity of a judgment on which the bankruptcy proceedings was founded even though it has not been set aside. Section 105(1) of the Bankruptcy Act 1967 may be invoked even after the time to appeal had lapsed.

(3) The court of bankruptcy has the power, at the instance of the debtor himself, to go behind the judgment and to enquire into the validity of the debt even though the debtor has previously applied in the action to set aside the judgment and his application has been refused and affirmed on appeal. In view of the provisions of s 92(1) of the Bankruptcy Act 1967, there is no reason why that power to go behind or around the judgment may not be exercised in an application to review, rescind or vary the receiving and adjudicating orders that had been made. This exceptional jurisdiction will of course be exercised only in a proper case.

(4) Where there is an express statutory prohibition, the court will not enforce a contract running foul of such prohibition. Such a contract is void and the court will not give effect to it even at the instance of a person who was party to the illegality.

(5) In the instant case, none of the parties concerned had the licence to sell or dispose or purchase X-ray apparatus and it followed that the transactions were in contravention of the Radioactive Substances Act 1968. The consideration was bad and it followed that a bankruptcy founded on an act of bankruptcy based on liability on such a judgment should not be allowed to stand.

Cases referred to

1 *Re Khoo Kim Hock* [1974] 2 MLJ 29 (folld)
2 *Re Stanger* (1883) 22 Ch D 436 (folld)
3 *Re Fraser, ex p Central Bank of London* [1892] 2 QB 633 (folld)
4 *Re Mahmoud & Ispahani* [1921] All ER 217 (folld)
5 *Re Onslow, ex p Kibble* (1875) 10 Ch App 373 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(a), 92(1), 105(1), 105(5)
Contracts Act 1950 s 24
Radioactive Substances Act 1968 s 3(1)

Geeta Jothilingam for the judgment creditor.
Ramdas Tikamdas for the judgment debtor.

Cur Adv Vult

VC George J: On 30 March 1984, one Dr AS Iaduray entered into an equipment lease agreement, the period of lease being 36 months, with Metroplex Leasing & Credit Corp Sdn Bhd ('Metroplex') in respect of a set of X-ray equipment known as the Universal Mobile Master 30 High Quality X-Ray Catalogue No 3110.30 which set included certain accessories.

On 21 January 1985, with the consent of Metroplex, Dr Iaduray by a deed assigned all his interest in the said equipment lease agreement to Dr Mathew Sebastian.

On 8 October 1985, Metroplex purported to terminate the lease and on 20 November 1985 caused a writ to issue against Dr Mathew Sebastian for the sum of $56,737.53 together with interest thereon at 2% per month from 8 October 1985 until realization and costs. The computation used to arrive at the said $56,737.53 was set out in the particulars of the claim in the statement of claim as follows:

Particulars	
Computation	
$836.70 x 36	$ 30,121.20
Less: $836.70 x 4	$ 3,346.80
	$ 26,774.60
Add: Tax loss (80% on $36,000)	$28,800
Add: Net RV (90:10% on predetermined value of $9,000)	$ 900
Add: Late interest charges	$ 263.53
	$ 56,737.53

The defendant failed to enter an appearance and a draft judgment in default dated 6 March 1986 was presented by the solicitors for the plaintiff to the senior assistant registrar seeking judgment for '$56,737.53 together with interest thereon at the rate of 2% per month from 8 October 1985 to the date of realization and costs $237'. The senior assistant registrar appeared to have approved the draft after amending the rate of interest and the data from which it should be computed to '8% pa from 20 November 1985'. However the judgment that was eventually entered was for $56,737.53 together with interest thereon at 2% per month from 20 November 1985 until realization and costs of $237.

Having obtained the judgment the plaintiff sought on 30 July 1986 to execute it by attaching the chattels of the defendant at his premises pursuant to a writ of seizure and sale. Apparently what the bailiff in fact did was to seal off the premises of the defendant in which the chattels were kept!

In November 1986, the defendant applied to have the default judgment set aside on the grounds that he had a good defence to the plaintiff's claim. The defences relied on were:

(1) that there had been an understanding between the parties that the plaintiff was to obtain a licence for the defendant to operate the X-ray machine, it being understood by the parties that the machine being an irradiating apparatus a licence to use it was necessary pursuant to the terms of the Atomic Energy Licensing Act of 1984 and that since such licence had not been obtained the defendant was not liable to the plaintiff;
(2) that the Ministry of Health had issued a circular on 18 October 1985 prohibiting the use of the apparatus and that accordingly the defendant was not liable to pay any moneys to the plaintiff.

This application was dismissed with costs on 16 January 1987. On 20 August 1987, the plaintiff issued a bankruptcy notice founded on the said default judgment amount and followed that by a bankruptcy petition, the act of bankruptcy relied on being the non-compliance of the demand contained in the bankruptcy notice.

On 7 December 1988, receiving and adjudicating orders were made. On 26 January 1989, the defendant filed an application for leave to appeal out of time the refusal to set aside the default judgment. This was eventually dismissed with costs.

The bankrupt now applies to the bankruptcy court invoking ss 92(1), 105(1) and 105(5) of the Bankruptcy Act 1967 as well as the inherent jurisdiction of the court (to make relevant orders where a miscarriage of justice had occurred). The subsections of those sections are as follows:

> 92(1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
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> 105(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.
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> (5) Where the court annuls an adjudication under this section it shall also rescind the receiving order.

The grounds of the application were set out in the notice of motion which was supported by the affidavit of the applicant. There was an affidavit in reply affirmed by Leong Seong Chee, the assistant manager of Metroplex.

On 26 April 1989, the matter came up for disposal when counsel for the applicant and for Metroplex were present as was the representative from the Official Assignee's office. The matter could not be disposed of because of shortage of time, it having been listed with some 125 other matters and was adjourned for the senior assistant registrar to allot another date which he did on 4 May 1989 by his letter of that date fixing the 29 May 1989 for the hearing.

When the matter was called, Encik Ramdas appeared for the applicant and Cik Geeta for Metroplex. Cik Geeta applied for an adjournment of the hearing on the ground that counsel briefed to argue the matter for Metroplex was engaged elsewhere in an arbitration the date of the hearing of which had been fixed before 4 May 1989!

It was conceded that Metroplex's solicitors came to know of the date allotted by the senior assistant registrar on or about 4 May 1989 and it startled me somewhat to hear the application for adjournment on the ground advanced. Now, where something had happened that put counsel in a position that he could not possibly attend the hearing of a matter and he had insufficient time to arrange

for somebody else to take up the brief, it has always been my practice to try and accommodate counsel even in the face of objection by the other side. But here in the first place it was not suggested that there was insufficient time to brief other counsel (and if it had been so suggested I wold have rejected such a suggestion since in my opinion, for the purposes of opposing the instant motion the period from on or about 4 May to 29 May was more than sufficient to brief other counsel) and in the second place no attempt, as far as I know, was made earlier to attend on the court to try and obtain another date and in the third place the application for adjournment appeared to be based on the premise that since prior to 4 May 1989 counsel who had been briefed to argue this motion for Metroplex had another appointment for 29 May 1989 he was entitled as of right, on 29 May 1989 when the matter was called, to have it adjourned.

Encik Ramdas informed the court that his client was most anxious to have the matter disposed of and objected to any adjournment. The application for adjournment was refused and the matter was proceeded with although Cik Geeta had informed the court that she had no knowledge of the matter and accordingly could not assist the court.

Later in this proceedings it was drawn to my attention that the Official Assignee was not present and may have not been notified of the hearing. However I was satisfied that the papers had been duly served on him and there was nothing in the motion that called for the court to seek any clarification from the Official Assignee.

The first point dealt with by Encik Ramdas was on the locus standi of the applicant, an undischarged bankrupt, to move this motion without the sanction of the Official Assignee as prescribed by s 38(1)(a) which subsection is as follows:

> 38(1) Where a bankrupt has not obtained his discharge —
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee;

Whether the prohibition prescribed by s 38(1)(a) applies to an invocation of s 92(1) and s 105(1) is fully discussed by Mohamed Azmi J (as he then was) in *Re Khoo Kim Hock*[1] at p 30 and with respect I would follow the decision and I do so for the reasons advanced by the learned judge in that judgment. Accordingly I also hold that s 38(1)(a) has no application to a s 92(1) or s 105(1), application both of which the instant application invokes.

Now while a bankrupt cannot bring an action to set aside a judgment even if it was obtained fraudulently because the cause of action is vested in his trustee, the bankruptcy court is entitled to enquire into the validity of a judgment on which the bankruptcy proceedings was founded even though it has not been set aside — see *Wilkinson & Mair, Hunter on The Law and Practice of Bankruptcy* (19th Ed) at p 147. It is also settled that s 105(1) may be invoked even after the time to appeal had lapsed — see 3 *Halsbury's Laws of England* (4th Ed) para 457 and the decision of the English Court of Appeal in *Re Stanger*[2] where at p 440 Cotton LJ said:

> No doubt, the twenty-one days have expired within which, under ordinary circumstances, the adjudication might have been questioned by means of an appeal; but the court has undoubtedly power, if it thinks the parties have made a proper case, to allow the question to be raised after that time. That was expressly decided by the Court of Appeal in *Ex parte Tucker* (1879) 12 Ch D 308.

It is relevant to also note that in *Khoo Kim Hock*[1] the application was made well after the time to appeal had expired.

3 *Halsbury's Laws of England* (4th Ed) deals with the question of the right of the court to go behind the judgment thus at para 357:

> Court not necessarily bound by judgment. Where the act of bankruptcy relied on is non-compliance with a bankruptcy notice, the judgment or order is conclusive in the bankruptcy court, unless the consideration for it can be questioned. However, for the purpose of determining whether a receiving order should or should not be made, the court may go behind the judgment or order and inquire into the consideration, and on finding that there was no valid or legal consideration, may refuse to make a receiving order. This may be done at the request of the debtor, even where the judgment or order was by consent. Even where the appellate court has refused to set aside the judgment or order, the bankruptcy court may still go behind it and inquire into the liability on which it is founded, but on the hearing of a petition the bankruptcy court has no power to go behind a judgment obtained in open court against a debtor represented there, no fraud being suggested.
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> The court should only go behind a judgment obtained by default or compromise, or whether fraud or collusion is alleged.

Reference is made in the footnotes to that passage in *Halsbury* to *Re Fraser, ex p Central Bank of London*[3] where the English Court of Appeal held that the court of bankruptcy has power at the instance of the debtor himself, to go behind the judgment and to enquire into the validity of the debt even though the debtor has previously applied in the action to set aside the judgment and his application has been refused and the refusal affirmed by the Court of Appeal. And in view of the provision of s 92(1), I see no reason why that power to go behind or around the judgment may not be exercised in an application to review, rescind or vary the receiving and adjudicating orders that had been made.

Upon pronouncement of the receiving and adjudicating orders the debtor virtually becomes a non-person and if in fact he ought not to have been put into the situation the Bankruptcy Act 1967 itself recognizes that the orders

made could be subject to review: apart from an appeal to the Supreme Court, s 92(1) provides that the bankruptcy court that pronounced the orders may review, rescind or vary its own orders. This exceptional jurisdiction will of course be exercised only in a proper case.

In the instant case the review is sought on the ground that the judgment on which the act of bankruptcy was founded is a judgment which has no valid or legal consideration and that in any event it was for an amount significantly in excess of what the plaintiff was entitled to sign judgment for and as such, particularly as it was a default judgment, is irregular and bad.

The submission in support of the contention that the consideration for the judgment was invalid is that the lease and the assignment thereof were at all relevant times illegal and as such null and void ab initio as each of them was made in contravention of s 3(1) of the Radioactive Substances Act of 1968 which is as follows:

> No person shall manufacture, sell, store, import or export any radioactive substance, irradiating apparatus or radioactive waste unless he is the holder of a valid permit issued under this Act authorizing him so to do.

'Sale' is defined in s 2 to include:

> (a) supplying or otherwise dealing in or disposing of, whether by way of sale, loan or gift;
> (b) barter; and
> (c) offering or attempting to sell, or receiving for sale, or exposing for sale, or having in possession for sale, or sending or delivering for sale, or causing to be sold, offered, or exposed for sale;
>
> and the words 'sell', 'vendor', and 'purchaser' have corresponding meanings.

It was submitted and I accept such submission that the wide definition given to 'sale' includes the said lease and the said assignment of lease in the instant case.

I pause to note that the letters from the Ministry of Health pertaining to the apparatus and the description of the apparatus in this lease all go to show that it was an X-ray machine in respect of which judicial notice can be taken that it is an 'irradiating apparatus'.

The Atomic Energy Licensing Act 1984 came into force on 1 February 1985 and replaced the 1968 Act and s 12(1) whereof is as follows:

> Without prejudice to the requirements of any other law, no person shall —
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> (a) site, construct or operates a nuclear installation;
> (b) deal in, possess or dispose of any radioactive material, nuclear material, prescribed substance or irradiating apparatus,
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> unless he is the holder of a valid licence issued under section 16(5) by the appropriate authority for such purpose and as specified in the licence.

'Dealing' is defined in s 2, viz:

> ... 'dealing', in relation to any radioactive material, nuclear material, prescribed substance or irradiating apparatus, means any activity involving the manufacturing, trading, producing, processing, purchasing, owning, using, transporting, transferring, handling, selling, storing, importing or exporting of such radioactive material, nuclear material, prescribed substance or irradiating apparatus;

It is to be noted that there are heavy penalties prescribed in both statutes for contravention of its provisions.

Now it is trite that where there is an express statutory prohibition the court will not enforce a contract running foul of such prohibition. Such a contract is void and the court will not give effect to it even at the instance of a person who was party to the illegality — see *Re Mahmoud & Ispahani*.[4] In that case there was a statutory prohibition (made by way of an order pursuant to regulations empowering the making of such an order) that prohibited the sale of licensed oil except to persons licensed to purchase the commodity. The issue was the validity of a contract for sale of licensed oil to an unlicensed buyer. Scrutton LJ said at p 222:

> I think the law is laid down in *Cope* v *Rowlands* (1836) 2 M&W 149 where Parke B, delivering the judgment of the court, said at p 157:
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> 'It is perfectly settled, that where the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, *Bartlett* v *Vinor* (1692) 90 ER 750. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?'
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> If so, the court is bound not to render assistance in enforcing an illegal contract. As I understand, two reasons are given why the court should enforce this contract. First of all, it is said that the court will not listen to a person who says: 'Protect me from my own illegality.' In my view, the court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract.

The common law rules invoked in *Re Mahmoud & Ispahani*[4] are embodied in s 24 of our Contracts Act 1950:

> The consideration or object of an agreement is lawful, unless
>
> (a) it is forbidden by law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

In the instant case, neither Metroplex nor Dr Iaduray nor Dr Mathew Sebastian had the licence to sell or dispose or purchase X-ray apparatus and it follows that the equipment lease agreement and its assignment to Dr Mathew Sebastian were in contravention of the said 1968 Act.

In *Re Onslow, ex p Kibble*,[5] Sir WM James LJ said:

I am of the opinion that the decision of the Registrar in this case was quite right. It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation. In the present case a bill of exchange had been drawn by an infant for jewellery purchased and money advanced to him. It is not pretended that there was any ratification of the original debt or of the bill of exchange after the infant came of age, until the judgment was allowed to go by default against him, under the Bills of Exchange Act. The only question, therefore, is whether the consideration for the judgment has not been taken away by the Infants' Relief Act, 1874. The first section enacts that all contracts thenceforth entered into by infants shall be absolutely void; and then the second section provides that no action shall be brought upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy. When the Act says that no action shall be brought, it must mean that the promise or ratification shall not be a good cause of action: so that a ratification made after the Act of a contract made in infancy before the Act is as void as a contract made by an infant after the Act. Therefore, on this ground, I think the Registrar came to a right conclusion.

It follows, accordingly, in my judgment that the court should inquire even at this late hour into the consideration for the judgment and having done so it is my judgment that the consideration is bad and it follows that a bankruptcy founded on ana ct of bankruptcy based on liability based on such a judgment should not be allowed to stand and, exercising my power of review pursuant to s 92, I would and do set aside the receiving and the adjudication orders made on 7 December 1988 in respect of Dr Mathew Sebastian.

Application allowed.

Solicitors: *Suhaimi Khor Zulkifli & Chang; Siva Ram & Associates.*

Reported by *PS Ranjan*

Lim Seong Choon & Anor v R Rayaratnam

HIGH COURT (PENANG) — CIVIL APPEAL NO 11-4-87
MOHAMED DZAIDDIN J
11 APRIL 1990

Tort — Damages — Special damages — Road accident — Claim for depreciation in value of car — Interest on special damages — Principles applicable

The plaintiff (respondent) claimed damages against the defendants for negligence arising out of a motor accident. One item of special damages was a claim for depreciation of the plaintiff's car in the sum of $1,000. At first instance, the magistrate allowed this claim and further awarded interest on special damages at 8% pa from the date of accident to the date of realization. The defendants (appellants) appealed against this award.

Held, allowing the defendants' appeal:

(1) The plaintiff can recover under special damages for diminution in value of his car but it is essential that appropriate evidence be called to prove it.

(2) In the present case, there was scanty and insufficient evidence for the learned magistrate to make such a finding. First, there was no evidence whether the car was a fairly new or an old car. Secondly, it was not enough to rely on the adjuster's report, which was submitted to the insurance company for the purpose of assessing the estimated cost of repair of the vehicle as a basis for arriving at the loss of the market value of the car. Further, it was sheer guess work to award $1,000 as compensation for the reduction in value of the car.

(3) Special damages may be fairly averaged out at half the usual rate of interest from the date of the accident to the date of judgment. As the conventional rate of interest permitted by the courts is 8% pa, the correct rate payable on special damages must be at 4% and not 8% pa from the date of accident until the date of judgment, and only thereafter would he be entitled to 8% pa.

Cases referred to

1 *Admiralty Comrs* v *SS Susquehanna* [1926] AC 655 (folld)
2 *Payton* v *Brooks* [1974] 1 Lloyd's Rep 241 (folld)
3 *Jefford* v *Gee* [1970] 1 All ER 1202 (folld)

M Thayalan for the plaintiff.
PR Manecksha for the defendants.

Cur Adv Vult

Mohamed Dzaiddin J: On 27 June 1984, the plaintiff's car was damaged in a collision with a car driven by the second defendant, the servant or agent of the first defendant. The plaintiff (respondent) issued the summons in the magistrate's court on 16 December 1985 claiming only for special damages against both defendants (appellants) on account of the second defendant's negligence. Under the 'Particulars of Special Damages' the plaintiff claimed, inter alia, a sum of $1,000 for depreciation. On 6 January 1987, the learned magistrate found the defendants wholly to blame and gave judgment for the plaintiff as prayed, including the sum of $1,000 for depreciation. She also awarded interest on special damages at 8% pa from the date of accident to the date of realization.